Tenaga Nasional Bhd v Kesang Trading Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22–53 OF 1996
NIK HASHIM J
18 JUNE 2002

Limitation *— Accrual of cause of action — Fraudulent concealment — Witholding of information from plaintiff — Whether plaintiff's action time barred — Limitation Act ss 6 and 29(b)*

Contract *— Estoppel — Estoppel by conduct — Unconscionable or unmeritorious conduct — Whether litigant guilty of unconscionable or unmeritorious conduct estopped from asserting limitation — Limitation Act 1953 s 6*

On 17 November 1986, the plaintiff (the purchaser) and the first defendant (the vendor), together with the proprietor, entered into a sale and purchase agreement in respect of property held under Geran No 8414, No Lot 213, Pekan Jertih Daerah Besut, Terengganu, together with a double storey shop house thereon ('the property') for RM220,000. The plaintiff made payments, carrying out its contractual obligations. On 19 June 1988, the proprietor transferred the property into the name of Tanjung Indah Sdn Bhd (the second defendant), without the plaintiff's knowledge. The plaintiff entered a private caveat on the property on 14 September 1991 and about five years later, on 20 October 1996, the plaintiff filed an action against the defendant claiming the money paid with interest and costs. The first defendant contended that the plaintiff's action was time barred by virtue of s 6 of the Limitation Act 1953 ('the Act'), ie the plaintiff's cause of action accrued on 19 June 1988 and thus expired on 18 June 1994. The plaintiff argued that the first defendant's failure to keep the plaintiff informed of the transfer of the property to the second defendant constituted a fraudulent concealment within s 29(b) of the Act, and this justifies postponement of the limitation period. The fraud was discovered on 14 September 1991.

Held, giving judgment to the plaintiff as prayed in the statement of claim with costs:

(1) Section 29(b) of the Act was inserted to protect a plaintiff who was ignorant of his right of action in the case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him. A very liberal interpretation is given to the term 'fraud' in s 26(b) of the English Limitation Act 1939 by the English Courts. This section is in pari materia with s 29(b) of the Act (see pp 5F–G, 6A).

(2) The burden was upon the first defendant to ensure that the transfer of the property was carried out at the appointed time. The first defendant owed a duty to inform the plaintiff if its part of the contractual bargain became impossible to perform. As such, the plaintiff had not failed to act with reasonable diligence to discover

the fraud on 14 September 1991. The plaintiff, being the purchaser unknown of the fraud, was entitled to rely on the good faith of the first defendant being the seller of the property to act in accordance with the terms of the contract. The withholding of information from the plaintiff regarding the transfer of the property to the second defendant amounts to fraudulent concealment on the part of the first defendant and thus s 29(b) of the Act is applicable (see pp 6I–7C).

(3) The doctrine of estoppel is relevant to this case. It has been held by the Court of Appeal that the doctrine of estoppel, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon the provisions of the Act that would defeat his opponent's case (see p 6D–E).

(4) The first defendant is estopped from relying on s 6 or for that matter, any of the provisions of the Act, to defeat the plaintiff's case. The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Thus, applying the doctrine to the facts of the present case, it would be inequitable and unjust to permit the first defendant to assert limitation against the plaintiff to defeat the plaintiff's case (see p 7E–F).

[Bahasa Malaysia summary

Pada 17 November 1986, plaintif (pembeli) dan defendan pertama (penjual), bersama dengan tuan punya hartanah, telah masuk ke dalam satu perjanjian jual beli berkenaan hartanah yang dipegang di bawah Geran No 8414, No lot 213, Pekan Jertih Daerah Besut, Terengganu, bersama dengan sebuah rumah kedai bertingkat dua ('hartanah tersebut') untuk RM220,000. Plaintif telah melaksanakan obligasi perjanjian tersebut dengan membuat bayaran. Pada 19 Jun 1988, tuan punya hartanah telah memindahmilik kepada nama Tanjung Indah Sdn Bhd (defendan kedua), tanpa pengetahuan plaintif. Plaintif telah memasukkan kaveat persendirian ke atas hartanah tersebut pada 14 September 1991 dan lima tahun kemudiannya, pada 20 Oktober 1996, plaintif telah memfailkan tindakan terhadap defendan menuntut wang yang telah dibayar bersama faedah dan kos. Defendan pertama menyatakan bahawa tindakan plaintif telah luput had masa di bawah s 6 Akta Had Masa 1953 ('Akta tersebut'), iaitu tindakan plaintif telah terakru pada 19 Jun 1988 dan telah luput pada 18 Jun 1994. Plaintif telah mengatakan bahawa kegagalan defendan pertama untuk memberitahu plaintif tentang pindahmilikan hartanah kepada defendan kedua merupakan penyembunyian fraud di bawah s 29(b) Akta tersebut, dan ini menjustifikasikan penundaan tempoh had masa. Fraud tersebut telah diketahui pada 14 September 1991.

Diputuskan, memutuskan untuk pihak plaintif seperti yang dipohon di dalam penyata tuntutan dengan kos:

(1) Seksyen 29(b) Akta tersebut telah disertakan untuk melindungi seorang plaintif yang tidak tahu mengenai hak beliau untuk bertindak di dalam kes penyembunyian fraud dan untuk mengatasi masalah bahawa masa tidak cukup, tanpa pengetahuan beliau. Tafsiran yang luas telah diberi kepada terma 'fraud' dalam s 26(b) di dalam Akta Had Masa 1939 Inggeris. Seksyen ini adalah pari materia dengan s 29(b) Akta tersebut (lihat ms 5F–G, 6A).

(2) Beban terletak pada defendan pertama untuk memastikan bahawa pemindahan hartanah tersebut dilaksanakan pada masa tertentu. Defendan pertama mempunyai kewajipan untuk memberitahu plaintif jika bahagian perjanjian beliau tidak dapat disempurnakan. Oleh itu, plaintif tidak gagal untuk bertindak dengan ketekunan yang munasabah untuk mendapat tahu tentang fraud tersebut pada 14 September 1991. Plaintif, yang merupakan pembeli tanpa mengetahui tentang fraud tersebut, berhak bergantung kepada suci hati defendan pertama, yang merupakan penjual hartanah tersebut, untuk bertindak menurut terma-terma perjanjian tersebut. Keengganan memberitahu plaintif tentang pemindahan hartanah tersebut kepada defendan kedua merupakan penyembunyian fraud defendan pertama, dan oleh itu s 29(b) Akta tersebut boleh dipakai (lihat ms 6I–7C).

(3) Doktrin estopel adalah relevan di dalam kes ini. Mahkamah Rayuan telah memutuskan bahawa doktrin estopel, apabila digunakan, akan menghalang litigan yang bersalah kerana berkelakuan tidak berhati perut atau tidak bermerit daripada menggunakan peruntukan Akta tersebut yang boleh mengalahkan kes lawan beliau (lihat ms 6D–E).

(4) Defendan pertama telah diestopkan daripada bergantung kepada s 6 ataupun sebarang peruntukan Akta tersebut, untuk mengalahkan kes plaintif. Doktrin estopel merupakan prinsip boleh lentur di mana keadilan dapat dicapai menurut keadaan kes. Menggunakan doktrin kepada keadaan kes ini, ia tidak saksama dan tidak adil untuk membenarkan defendan pertama untuk menegaskan had masa terhadap plaintif untuk mengalahkan kes plaintif (lihat ms 7E–F).

Notes

For cases on accrual of cause of action, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1950–1955.

For cases on estoppel by conduct, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2661–2666.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 (refd)

Beaman v ARTS Ltd [1949] 1 All ER 465 (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (Executor of the Estate of Loo Cheng Ghee) [1998] 4 MLJ 651 (refd)
Sia Siew Hong v Um Gim Chian [1996] 3 MLJ 141 (refd)

Legislation referred to

Limitation Act 1953 ss 6, 29, (a), (b)
Limitation Act 1939 [Eng] ss 26(a), (b)
Rules of the High Court 1980 O 14A

Appeal from:

Goh Peng Hong (Bakar & Partners) for the plaintiff.
Lucy Tan (Mohamed Ismail & Co) for the first defendant.

Nik Hashim J:

The application

The parties have agreed to resolve the issue of limitation that arises in this action by making an application under O 14A of the Rules of the High Court 1980 seeking for the determination of this court on point of law whether the plaintiff's action is time barred under the Limitation Act 1953 ('the Act'); and the parties have also agreed that in the event the plaintiff's action is time barred, the plaintiff's action will be dismissed with costs, and if it is not, then judgment will be entered for the plaintiff as prayed.

On 17 November 1986, the plaintiff ('the purchaser') and the first defendant ('the vendor'), Kesang Trading Sdn Bhd, together with Kesang Housing Sdn Bhd ('the proprietor') entered into a sale and purchase agreement in respect of a property held under Geran No 8414, No Lot 213, Pekan Jertih, Daerah Besut, Terengganu together with a double storey shop house thereon ('the property') for a price of RM220,000. At all material times, the plaintiff had carried out its contractual obligation by making payments totalling RM198,000 as at 4 December 1986 in accordance with the terms of the agreement. On 19 June 1988, without the knowledge of the plaintiff, the proprietor transferred the property into the name of Tanjung Indah Sdn Bhd ('the second defendant'). On 14 September 1991, the plaintiff entered a private caveat on the said property. Thereafter, about five years later, ie on 20 October 1996, the plaintiff filed the present action against the first defendant claiming, among other things, the return of RM198,000 with interest and costs.

The contentions of the parties

The first defendant contends that the plaintiff's action is time barred by virtue of s 6 of the Act which bars an action based on contract to be brought after the expiration of six years from the date on which the cause of action accrued. It is contended that the plaintiff's cause of action accrued on

19 June 1988 which is the date on which the proprietor transferred the property into the name of the second defendant. The six year period within which the plaintiff should have filed its action therefore expired on 18 June 1994. On that ground alone, it is alleged that the plaintiff's claim, which the first defendant claims a simple breach of contract, ought to be dismissed as the claim was only filed on 20 October 1996, approximately two years and four months after limitation had set in.

The plaintiff, on the other hand, argues that the first defendant's failure to keep the plaintiff informed of the transfer of the property to the second defendant constitutes a fraudulent concealment within the purview of s 29(b) of the Act that justifies the postponement of limitation period, which the plaintiff claims does not begin to run until the plaintiff discovered the fraud on 14 September 1991 when the plaintiff entered a private caveat on the said property. Since the action was filed on 20 October 1996, the plaintiff contends that its action is still within the six year limitation period.

The law

Section 29 of the Act states:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) ...
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> ...

Section 29(b) in particular, was inserted to protect a plaintiff who was ignorant of his right of action in the case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him (see *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at p 412).

28 *Halsbury's Laws of England* (4th Ed) at p 413 states:

> Fraudulent concealment has been defined in relation to an action to recover property, as designed fraud by which a person, knowing to whom the right belongs, conceals the circumstances giving the right, and by means of that concealment enables himself or some other person to enter and hold property.
>
> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act gives rise to the right of action is performed.
>
> 'Fraud' does not necessarily imply moral turpitude; it is enough if the conduct of the defendant or his agent is so unconscionable that it would be inequitable to allow him to rely on the limitation period.

A very liberal interpretation was given to the term 'fraud' in s 26(b) of the English Limitation Act 1939 by the English courts. This section is in pari materia with s 29(b) of the Act. Associate Professor Chong Yeow Choy in *Law of Limitation*, Butterworths Asia 1995 at p 113 pointed out that 'a plaintiff who is unable to bring his case within s 29(a) will still succeed in defeating the defence of limitation by bringing the case within s 29(b)'. The learned author referred to the case of *Beaman v ARTS Ltd* [1949] 1 All ER 465 where the Court of Appeal held that the case did not fall within the ambit of s 26(a) of the 1939 Act, it was nevertheless willing to accept that the plaintiff's right of action had been fraudulently concealed within s 26(b).

Although the defendants in that case had taken no positive steps to hide the existence of the cause of action from the plaintiff, the Court of Appeal in *Beaman* was concerned, the notion of fraud in s 26(b) extended to any case where the defendant may be said to have acted dishonestly or unconscionably, and this included the situation where the wrongful act was committed surreptitiously. The fact that: (1) the defendants made no attempt to obtain the plaintiff's instruction before disposing of her property for their own convenience; (2) the defendants were in breach of the confidence imposed on them; and (3) the defendants did not inform the plaintiff of what they had done at any time thereafter, constituted a reckless 'concealment by fraud' of the right of action within s 26(b)'.

Besides, the doctrine of estoppel is also relevant to this case. It has been held by the Court of Appeal that the doctrine of estoppel, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon the provisions of the Act that would defeat his opponent's case (see *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (Executor of the Estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; *Sia Siew Hong v Um Gim Chian* [1996] 3 MLJ 141.

Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Act.

The findings of the court

Reverting to the facts of the case, it is noted from the sale and purchase agreement in respect of the property, that the person who signed on behalf of the first defendant, Kesang Trading Sdn Bhd and the proprietor, Kesang Housing Sdn Bhd, was the same person, Wong Siew Yin. Therefore, the first defendant, being closely related to the second defendant, not only in their names which are almost similar, but also in their staff, Wong Siew Yin, though the two companies are two different entities, could not be heard to say that the transfer of the property to the second defendant was executed without its knowledge. Taking into account the relationship between the plaintiff and the first defendant, as the purchaser and the seller of the property respectively, together with the fact that the first defendant had received the contractual sum, the burden lies upon the first defendant to

ensure that the transfer of the property is carried out at such appointed time. Indeed, the first defendant owed a duty to inform the plaintiff in the event that its part of the contractual bargain becomes impossible to perform. As such, the plaintiff had not failed to act with reasonable diligence to discover the fraud on 14 September 1991, ie three years after the fraud had been committed. The plaintiff, being the purchaser unknown of the fraud, was entitled to rely on the good faith of the first defendant being the seller of the property to act in accordance with the terms of the contract. But unfortunately, the first defendant chose to be silent and did nothing to perform its part of the contract. Therefore, the witholding of information from the plaintiff regarding the transfer of the property to the second defendant, amounts to fraudulent concealment on the part of the first defendant. Thus, s 29(b) of the Act is applicable and hence, the plaintiff is protected by the section.

In this regard, I, with respect, agree with the plaintiff's counsel that the plaintiff, as an innocent and ignorant purchaser, had been deceived by the first defendant into executing the agreement without receiving any consideration for the money paid. The first defendant's refusal to return 90% of the purchase price for the purchase of the property (which has now become impossible) would undoubtedly constitute an unconscionable and unmeritorious act. The first defendant is thus guilty of such conduct. This court cannot condone such a patent fraudulent and dishonest act of the first defendant.

Moreover, by the doctrine of estoppel, the first defendant is estopped from relying on s 6 or for that matter, any of the provisions of the Act, to defeat the plaintiff's case. The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Thus, applying the doctrine to the facts of the present case, I hold that it would be inequitable and unjust to permit the first defendant to assert limitation against the plaintiff to defeat the plaintiff's case.

In conclusion, I hold that the plaintiff's action is not time barred. As such, I give judgment to the plaintiff as prayed in the statement of claim with costs, and the claim for the damages will be assessed by the registrar.

Judgment given to the plaintiff as prayed in the statement of claim with costs.

Reported by Chew Phye Ken